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**In America's Best Interests:
1977 Additional Protocol I to the Geneva Conventions, Redux**

by

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*And if a beachhead of cooperation may push back the jungle of suspicion,
let both sides join in creating a new endeavor, not a new balance of power, but
a new world of law, where the strong are just and the weak secure
and the peace preserved.*

President John F. Kennedy
Inaugural Address, 20 January 1961


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| 14. ABSTRACT <p>Protocol I to the famous 1949 Geneva Conventions expanded the protection afforded to victims of international armed conflicts, incorporating "a wide range of provisions regarding protection of the wounded and sick, methods and means of warfare, and protection of the civilian population and civilian objects from dangers arising from hostilities." The U.S. signed the accord in December of 1977, but soon after, Protocol I become a lightning rod of controversy for some domestic critics. This paper will show that it is in America's best interests to revisit her decision to reject Protocol I, and if possible, to ratify it. But even failing that as a realistic option, the U.S. should and must make clear its position on the Protocol, openly embracing and supporting those provisions which codify existing customary international law or constitute positive developments in the Law of War, while specifically noting which articles it finds objectionable, and laying out a sound, reasonably articulable basis for those objections. Doing so will enhance our relations and our military operations with our closest allies, provide our own military forces the clear and understandable guidance they need, and secure a crucial opportunity for the U.S. to take a leading role in the advancement of international humanitarian law.</p> | | | | | |
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No one who has ever seen the “Highway of Death” will ever forget it. So named by American soldiers during Desert Storm, the road to Basrah, Iraq, was the site of a desperate gambit by the remnants of Saddam Hussein’s army to escape destruction and fight another day. For many of these units, the road became their ribbon of a graveyard. Pocked with massive craters and strewn with the smoldering hulks of wheeled vehicles and tanks melted down to their tracks, the highway was a place of eerie stillness after what must surely have been a scene of total chaos. Having deployed to Desert Shield/Desert Storm as a junior Judge Advocate assigned to an artillery brigade, I remember commenting to our Chaplain that this must be what the landscape of hell looked like: the awesome power of the latest in modern weaponry meets the timeless horror of war.



Our convoy continued on, passing by captured Iraqi soldiers rounded up in small groups. Left to guard tiny foxholes in the middle of the vast desert with minimal food and water, the hungry and frightened soldiers had surrendered quickly. U.S. soldiers reached out from passing vehicles to toss their vanquished enemy some MREs and bottles of water. Farther down the road, an Iraqi family fleeing the combat zone had narrowly escaped death: an A-10 had strafed their unmarked truck, mistaking it for an enemy vehicle. Large-caliber bullet holes traced a jagged line down the very centerline of the truck’s cab and hood. Miraculously, no one in the terrified family of five crammed within it had been hurt. Some U.S. soldiers were now speaking calmly with the adults, handing them food and water and directing them back to the nearest safe area.

These scenes from Desert Storm reflect the reality that war, as awful and unimaginably destructive as it has become today, nevertheless continues to coexist side

by side with humanitarian efforts to reduce the suffering of its victims. The Law of War was designed to calibrate the balance between these two apparently incompatible, but actually inseparable concepts. In fact, “the basic premise of humanitarian law is the existence of conflicts,” “[i]ts aim... to limit the effects of hostilities and to alleviate suffering.”¹ The Protocols Additional (I and II) to the famous 1949 Geneva Conventions, finally drafted in 1977, aimed to take those humanitarian efforts some crucial steps further. Protocol I expanded the protection afforded to victims of international armed conflicts, incorporating “a wide range of provisions regarding protection of the wounded and sick, methods and means of warfare, and protection of the civilian population and civilian objects from dangers arising from hostilities.”² Protocol II responded to a growing need to extend the protections of the Law of War to increasingly bloody “internal” or “civil” wars.³ Both were designed to complement the original four 1949 Geneva Conventions, while also advancing the Law of The Hague.⁴

Yet the Protocols-- and in particular Protocol I-- have since become a lightning rod of controversy within the United States, which signed both accords in December of 1977.⁵ Approaching thirty years later, 163⁶ out of the 193 members of the United Nations-- among them, nearly every one of our major allies-- have now ratified Protocol I. In the interim, U.S. intentions toward the treaty veered 180 degrees away from ratification, while— under a barrage of increasingly vitriolic attacks on the treaty by its critics -- our position as to the acceptability of its provisions has grown increasingly ambiguous.

Today, the challenges, threats and opportunities of a post-9/11 world call more strongly than ever for a fresh, objective look at the protocols, particularly the more

complex and controversial Protocol I. This paper aims to examine the costs and benefits of our position—or lack thereof-- as to this agreement, which has achieved a substantial level of ratification with one notable exception: the world's lone remaining superpower, the United States. Today, to the consternation of our allies around the world and the confusion of our own military, we appear to have moved from nearly total acceptance, to growing objections to some major provisions, to a complete rejection of the entire Protocol as hopelessly tainted.

Are America's best interests today and in the future served by continuing to forego ratification of Additional Protocol I? Are there really advantages to be gained by maintaining an ambiguous stance as to the legitimacy of its provisions?

A few commentators having great influence continue to view the accord-- and even the concept of international law as a constraint on the actions of states — with either suspicion or outright hostility. This paper aims to show that such a skewed perspective toward the Protocol, and its distortion of the meaning of many key provisions, is actually counter-productive to our national interests. The U.S. is, in fact, not served by a state of legal ambiguity as to these important developments in the Law of War. Ratification of the Protocol, albeit with some reservations and clarifications, would be the optimal choice. But even failing that as a realistic option, the U.S. should and must make clear its position on the Protocol, openly embracing and supporting those provisions which codify existing customary international law or constitute progressive steps in the Law of War, while specifically noting which articles it finds objectionable, and laying out a sound, reasonably articulable basis for those objections. To fail to do so needlessly complicates our relations and our operations with our closest allies, denies our own military forces the

clear and understandable rules they need to guide them, and squanders a crucial opportunity for the United States to take a leading role in the advancement of the law of armed conflict. Indeed, continuing to ignore the constructive achievements of the Protocol due to a myopic obsession with its flaws deflects well-deserved credit from the U.S., which was the major force behind its drafting and, despite not being a party, leads the world in actual implementation of many of the Protocol's major, positive provisions.⁷ It is in America's best interests to revisit and rethink her decision to reject Protocol I, a step which-- given the current environment-- admittedly demands vision, political will, and even courage.

The Impetus for the Protocols

The United States, in keeping with its history of leadership in the Law of War dating back to President Lincoln's commissioning of the Lieber Code,⁸ took the lead in negotiating and drafting the Additional Protocols during a Diplomatic Conference sponsored by the International Committee of the Red Cross (ICRC) beginning in 1973. Fresh from its own experience in Vietnam, the U.S. was intent on updating the Law of War to better reflect the reality of the modern battlefield, particularly the advent of guerilla warfare, and the concomitant need to offer better protections to the victims of these unconventional types of wars. The Vietnam experience formed part of the greater "Cold War" between the West and the Soviet bloc: it was an era of strident ideological clashes as well as actual "proxy" wars, internal conflicts infused with an international component. Moreover, Protocol I harkened even further back to World War II, and the continuing concern that genuine resistance fighters -- such as the French partisans operating against the Nazis in occupied France -- were not adequately protected by the

post-war Conventions. The four-year-long treaty negotiations, led by an impressive U.S., interagency team of subject-matter experts, managed to win consensus from a surprisingly large and varied number of countries in updating the Law of War to reflect these modern conditions. The resulting Protocols were at once conventional and audacious. On the first day it was possible to do so, the U.S. under President Jimmy Carter signed both accords. That the U.S. would someday reject or decline to ratify the treaties must have seemed impossible at the time.

The Backlash Begins

Within a few years after the United States signed them, the Protocols, and particularly Protocol I, began to come under fierce attack. Protocol I, argued one pundit, constituted an “anti-humanitarian step” because it “would enhance the international status of terrorist organizations and give individual terrorists new rights in war.”⁹ Another commentator seconded that assertion, characterizing the protocol as “law in the service of terror,”¹⁰ since-- among other harmful effects-- it would grant Prisoner of War (POW) status to bomb-carrying terrorists disguised as harmless civilians.¹¹ Due to the spinelessness of the major Western powers in the face of pressure from the Third World, Socialist Countries, and terror groups posing as liberation movements, Protocol I emerged as “a pro-terrorist treaty masquerading as humanitarian law.”¹²

With the change in the White House, those incendiary charges began to hit their aim. By the time the Reagan administration was ready to take action on the treaties in 1987, the decision was made to submit only Protocol II for ratification by the Senate.¹³ In line with the earlier criticisms of it, the Reagan administration decided to hold back Protocol I rather than submit it for ratification, citing two of its provisions, among other

shortcomings, as being so objectionable that they rendered the agreement “fundamentally and irreconcilably flawed.”¹⁴

Though not mentioned by name and number, the two primary provisions to which the Reagan administration objected were Articles 1(4) and 44(3) (as this paper will note later, these particular objections by the United States were not without some irony). As explained in both the President’s and the State Department’s letters of transmittal, Article 1(4) was unacceptable because, in treating certain “wars of national liberation” as international armed conflicts covered by the Protocol, it potentially “legitimized” terrorist groups.¹⁵ Article 1(4) extended the applicability of Protocol I to

...include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁶

The President’s letter further stated that, presumably through the language of Article 44, the Protocol would grant combatant status to irregular forces even if they did not satisfy the traditional requirement to distinguish themselves from the civilian population and comply with the law of war, thus undermining the fundamental principle of distinction. Article 44(3) of the Protocol states, in pertinent part, that in certain “situations in armed conflicts where, owing to the nature of the hostilities, an unarmed combatant *cannot so distinguish himself, he shall retain his status as a combatant.*”¹⁷

While noting that Protocol I, in addition to these two specific instances, also contained a number of unidentified provisions which were otherwise “militarily unacceptable,” the President’s letter also confirmed that the treaty included “certain meritorious elements,”¹⁸ since some “of its provisions reflect customary international law

and... others appear to be positive new developments”¹⁹ in the law of armed conflict. Nevertheless, because its flaws were so fundamental, the President proposed instead to “devise an alternative reference for the positive provisions of Protocol I” and consult with “our allies to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law.”²⁰

Despite U.S. efforts to persuade other countries not to ratify Protocol I, the treaty has attained nearly universal acceptance if not implementation.²¹ State-parties to the accord include our major NATO allies, the United Kingdom, Spain, France and Germany, all of which ratified the treaty and made various specific reservations or declarations addressing many of the same types of concerns which have troubled the U.S.

In contrast, the United States’ position as to which parts of Protocol I it accepted as customary international law and which parts it considered positive new developments were never fully spelled out. The “alternative reference” never actually having materialized, a presentation by the second-most-senior lawyer in the U.S. State Department at the time, Michael J. Matheson, became the next best thing to an official U.S. position. Mr. Matheson, then the Deputy Legal Advisor for the State Department, addressed the U.S. stance on Protocol I in remarks made at an American University Workshop in 1987. In his presentation at the conference, Mr. Matheson delineated the U.S. position as to which major provisions of Protocol I it recognized as customary international law, and which others were acceptable as a matter of policy.²² Additionally, he specified which provisions, in addition to the two originally cited in the President’s letter of submittal, the U.S. rejected as being inconsistent with customary international law.

Some Guidance is Better than No Guidance

The Matheson article was the most definitive rendering of the U.S. position then available, given the decision not to ratify Protocol I, and—though not comprehensive-- at least offered some crucial guidance as to which provisions needed to make their way into the military's doctrine and practice. The Judge Advocate General's School of the Army, for example, annually publishes the "Operational Law Handbook,"²³ which covers a number of areas in which a deploying Judge Advocate may expect to encounter legal issues, to include Fiscal Law, Intelligence Law, and the Law of War. In that last chapter, under the subtitle "1977 Geneva Protocols," the Handbooks for 2000, 2001, 2002, and 2003 reflect the Matheson formulation in stating that the "U.S. views the following GP I articles as either legally binding as customary international law or acceptable practice though not legally binding:"

| Article | Provision |
|----------------|--|
| 5 | Appointment of Protecting Power |
| 10 | Equal Protection of Wounded, Sick, and Shipwrecked |
| 11 | Guidelines for Medical Procedures |
| 12-34 | Medical Units, Aircraft, Ships, Missing and Dead Persons |
| 35(1)(2) | Limiting Methods and Means of Warfare |
| 37 | Prohibitions against Perfidy |
| 38 | Prohibitions against Improper Use of Protected Emblems |
| 45 | Prisoner of War Presumption for those who participate in the hostilities |
| 51 | Protection of the Civilian Population (Except. Para. 6—Reprisals) |
| 52 | General Protection of Civilian Objects |

- 54 Protection of Objects Indispensable to the Survival of the Civilian Population
- 57-60 Precautions in Attack, Undeclared Localities, and Demilitarized Zones
- 62 Civil Defense Protection
- 63 Civil Defense in Occupied Territories
- 70 Relief Actions
- 73-89 Treatment of Persons in the Power of a Party to the Conflict; Women and Children; and Duties Regarding Implementation of GPI).

This same paragraph of the Handbook further states that the U.S. “specifically objects” to the following articles:

| Article | Provision |
|---------|---|
| 1(4) | GPI applicability to certain types of armed conflicts – wars of national liberation from “colonial domination,” “alien occupation,” and “racist regimes.” |
| 35(3) | Environmental Limitations on Means and Methods of Warfare. |
| 39(2) | Limits on the Use of Enemy Flags and Insignia. |
| 44 | Expansion of Definition of Combatants, relaxing of requirement to wear Fixed Distinctive Insignia recognizable at a distance; reducing threshold of lawful combatant status to requirement to carry arms openly during military engagement or in military deployment preceding an attack; when visible to an adversary. |
| 47 | Non-protection of Mercenaries. |
| 55 | Protection of the Natural Environment. |
| 56 | Protection of Works and Installations containing Dangerous Forces. |

In 2004, the Manual significantly cut back the paragraph containing Mr. Matheson’s assessment, and removed the specific listings of acceptable and unacceptable

provisions. Its guidance noted only that, although the United States had not ratified either protocol, to date, 155 nations had, and therefore,

U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. U.S. military forces *may not* be obligated to comply with API provisions that do not codify the *customary practice of nations*. This difference in obligation has not proved to be a hindrance to U.S./allied or coalition operations since promulgation of API in 1977.²⁴

In the 2005 version of the Handbook, the equivalent of the original paragraph citing customary international law and specifically listing acceptable and unacceptable provisions, reappeared in full. This was a short-lived revival, however. In September of 2004, the Judge Advocate General's School of the Army issued an "Errata Sheet" for the 2005 Handbook, stating that this particular paragraph should be disregarded. The Errata Sheet advised that "[t]his information was taken from an article written by Michael Matheson in 1986. It takes an overly broad view of the US position and, as a result, may cause some confusion as to US Policy."²⁵ This reassessment was echoed in a 2003 article by W. Hays Parks, Office of the General Counsel, Department of Defense, which also disavows the Matheson article as an accurate statement of the U.S. position.²⁶ The article characterized as "personal opinion" Matheson's assertion that "certain provisions of Protocol I reflect customary international law or are positive new developments which should... become part of that law."²⁷ Unfortunately, the Errata Sheet contains no further guidance as to what the U.S. position might be today: it replaces the Matheson formulation with silence.

A comparative survey of all the services' equivalent handbooks and manuals in recent years reveals a similar lack of visibility as to the U.S. official position on Protocol

I. Some publications refer to various provisions of the Protocol throughout their text without including a separate listing as to which provisions are binding on U.S. forces. For example, the Air Force's Guide for Air & Space Forces, *Air Force Operations and the Law*, notes various provisions of Additional Protocol I throughout the narrative. Within the section entitled, "Prosecution of War Crimes," the Guide notes that Article 86 of Additional Protocol I "represents the first attempt to codify the customary doctrine of command responsibility."²⁸ Other publications, such as *The Commander's Handbook on the Law of Naval Operations*, take a similar tack as the Army Manual, acknowledging that some of Protocol I's provisions do codify customary international law, but referring the reader to the Matheson article, among others, for the range of opinion, pro and con, as to which articles are applicable to U.S. forces.²⁹ Elsewhere, the Commander's Handbook also refers to specific Articles of the Additional Protocol, as it does in Chapter 5.3, "Combatants and Non-Combatants," quoting Article 43(1)'s definition of the term "combatant." Similarly, both the Army's FM 27-10, *Law of War*, and the Air Force's Pamphlet AFP 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*, incorporate language directly from Protocol I regarding the principles of distinction and proportionality as well as in discussing targeting considerations.³⁰

These military manuals are cited not for the purpose of showing which provisions of Protocol I constitute customary law and which do not, although they may be some evidence of state practice. The true purpose here is to illustrate that the United States government lacks a clear position on Protocol I, a circumstance which is contrary to U.S. interests. Although probably envisioned when President Reagan decided not to forward the Protocol for ratification, no U.S. agency has produced a definitive policy document

concerning the U.S. position on the Protocol. This “policy vacuum” has resulted in significant consequences for U.S. strategy and policy. America has effectively stepped back from an active leadership role in the development of international law. The U.S. military, whose doctrine and command policy depend on clear guidance from above, has been left to determine its government’s position as best it can, its efforts at interoperability with coalition partners and allies complicated by the fact that nearly all of them have ratified Protocol I and are bound by its provisions. This paper submits that the legal ambiguity in our position should be corrected by at least officially identifying those elements which the United States can support, even if ratification is still felt to be inappropriate. Moreover, this situation begs the question of whether the benefit of this Treaty’s beneficial provisions may be fully obtained without, as Secretary of State Schultz wrote of Protocol I, having to pay “an unacceptable and thoroughly distasteful price for joining a convention drawn to advance laws of war.”³¹

Guilty as Charged? Retrying those “Irreconcilable and Fundamental Flaws”

Before examining which provisions of Protocol I either codify customary international law or represent positive developments for the U.S., we should first revisit the original provisions found so objectionable by commentators as to taint the entire treaty. A reasoned, clear-eyed examination of the two main objections reveals that they actually pose no obstacle to achieving the Protocol’s positive goals. Upon such examination, the Protocol’s Article 1(4) provision regarding “Wars of National Liberation” emerges “a dead letter.”³² The second major objection, based on the allegation that the Treaty “protects and legitimizes” terrorists³³ is completely without merit: in fact, the opposite is true. Though not a main focus of the Protocol, many of its

provisions actually help to define and enforce strong prohibitions against a range of typical terrorist acts. Rather than a result of yielding to “radical groups responsible for terrorist acts,”³⁴ or a preference for “compromise” over the “maintenance of principle,”³⁵ both relevant provisions were the focus of sustained, dogged, and keen negotiation by the United States and its allies.

“Wars of National Liberation”

International agreements are never negotiated in a vacuum, but rather against the backdrop of history, recent and long-past. So it is that Protocol I reflects the experience of the nation-states that drafted and agreed to its provisions. The period in which Additional Protocol I was negotiated—1973 through 1977—were years of rapid change and great political upheaval in the world. The very first paragraph of Protocol I, which treats “Wars of National Liberation” on a par with international armed conflicts, is a highly controversial artifact of that era. “[M]ost Western states, including the United States, reacted negatively” to Article 1(4), “primarily out of concern either that it would import into humanitarian law the dangerous concept of the just war, and might lead to other provisions limiting protection of the law to those engaged in ‘just wars,’ or that it could be construed to justify external intervention in such wars.”³⁶ The concern that this highly-charged language “would politicize humanitarian law”³⁷ does have some merit: in one of its many paradoxes, the law of armed conflict by necessity demands reciprocity regardless of the goodness of the *casus belli* (the grounds or justification for going to war) of either side. In theory, Article 1(4) arguably would treat individuals as combatants—persons entitled to engage in armed conflict -- based on their political aims. In practice, however, the “Wars of National Liberation” language is mostly symbol

and little substance. For a number of important reasons-- like an algorithmic series tending towards zero-- it is a self-limiting provision.

The scope of Protocol I is limited to “Common Article 2”³⁸ international armed conflicts with the very controversial exception of Article 1(4), which includes the aforementioned situation “in which peoples are fighting against colonial domination and alien occupation and against racist regimes.”³⁹ Couldn’t this provision, argue critics, open the door to legitimize the use of violence— and terrorist methods-- to topple governments around the world? As one of the Protocol’s most vociferous-- and ultimately highly influential foes-- charged, the “National Liberation” language of the Protocol would be “an endorsement, in the politically potent form of a legal instrument, of both the rhetoric and the anti-civilian practices of terrorist organizations that fly the banner of self-determination.”⁴⁰ Yet, neither the conditions present at the time of negotiation, nor the years that have passed since have borne out these ominous warnings.

The first reason for this is that each element of paragraph 1(4) refers to specific events occurring at the time of its negotiation. The decolonization process, begun after World War II, was all but complete. The phrase “colonial domination” clearly refers to the particular circumstances affecting Angola, which was then seeking independence from its Portugal. Similarly, “alien occupation” referred to Israel’s alleged occupation of Palestinian territories, while “racist regimes” unmistakably targeted South Africa’s apartheid government.⁴¹ All three unique situations have since been “overcome by events.” Angola won its independence in 1975;⁴² viewed in terms of its legislative history and the UN Charter, the common understanding of Article 1(4) is that “only peoples who have not yet exercised their right to self-determination may qualify,” i.e., it

may be exercised only once.⁴³ Similarly, in South Africa, the formerly outlawed anti-apartheid organization, the African National Congress (ANC), is today the party in power, the “racist regime” structure of apartheid having been dismantled in the early nineties through both internal resistance and international pressure. The Palestinian Liberation Organization (PLO), although not yet having attained its goal of a Palestinian state, has achieved at least quasi-state status and is again engaged in negotiating a peace with Israel.⁴⁴

Secondly, it is a mistake to read Article 1(4) in isolation, a frequent habit of the Protocol’s critics, which gives the “National Liberation Movement” language much more impact than it was ever designed to have. Article 96(3) imposes strict requirements on any such movements wishing to apply Protocol I to a conflict in which it is involved. Paragraph 3 requires that “the authority representing a people engaged against a High Contracting Party” in an Article 1(4) conflict must address a “unilateral declaration” to the depository (here, the Swiss government) that it will “assume the same rights and obligations as those which have been assumed by a High Contracting Power to the Conventions and this Protocol.”⁴⁵ The upshot of this provision is that the Conventions and this Protocol become “equally binding upon all Parties to the conflict.”⁴⁶ Arguably, both provisions 1(4) and 96(3) together seek to bring these movements into “the system” by offering “an inducement... to submit to the accepted humanitarian standards, for the benefit of the civilian population.”⁴⁷ These prerequisites to coming under the ambit of Protocol I are, however, quite difficult to comply with in real-world conditions. Exhibit A is the fact that, while Protocol I has been in existence, not one “National Liberation Movement” has managed to invoke this much-vaunted provision.⁴⁸ Thirdly, declarations

or reservations by ratifying states have severely limited the potential use of the National Liberation Movements clause to the point of nullity. Several of our NATO allies (with whom we worked closely in negotiating Protocol I⁴⁹) have adopted statements similar to that of the United Kingdom, which stated upon ratification:

Re Article 1, paragraph 4 and Article 96, paragraph 3. It is the understanding of the UK that the term “armed conflict” of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes, including acts of terrorism, whether concerted or in isolation.

The UK will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the UK shall have *expressly recognised* that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the typed to which Article 1, paragraph 4 applies.

Finally, the charge that Article 1(4) fatally poisons whatever positive provisions it may contain, comes across as particularly overwrought when we consider that the United States is a party to the 1979 International Convention Against the Taking of Hostages, aimed at “the prevention, prosecution and punishment” of all acts of hostage-taking “as manifestations of international terrorism.”⁵⁰ Article 12 specifies that the Convention prohibits during peacetime these acts which are already prohibited during armed conflict by both the Geneva Conventions and its Protocols, and repeats the exact same language of Article 1(4), to wit:

[T]he present convention shall not apply to an act of hostage-taking committed in the course of armed conflicts... including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimens in the exercise of their right of self-determination...⁵¹

Not unlike unicorns, if the threat to the law of armed conflict of “National Liberation Movements” every really existed in terms of Protocol I recognition, it is safe to say that it is extinct now. More likely, the phrase was meant then and remains today a symbolic reference to a universal human aspiration, albeit colored by the ideological divide of the time. Moreover, any hope of gaining “legitimacy” or “recognition” for these movements by including such “politicized” language was further narrowed by the addition of language, at U.S. insistence, that the Protocol (and the Geneva Conventions) would apply “without any adverse distinction based on the nature of origin of the armed conflict or on causes espoused by or attributed to the parties to the conflict.”⁵² No doubt, the Protocol would have been better off without the “Liberation Movement” language, which sounds quite dated today, but—through skillful drafting and the press of real-world events—it is in any case a toothless article, a “dead letter.”⁵³

Erstwhile Enemies, Common Experience

A second phenomenon of the mid-seventies was the series of “small wars” then underway throughout Southeast and Southwest Asia, Africa, and Latin America. Thus, despite having recently concluded a long and extremely bitter conflict with Vietnam, the United States took the extraordinary step of actually negotiating certain provisions with its former enemy under the auspices of the Conference.⁵⁴ The U.S. sought a number of benefits. It worked to enhance protections for our own soldiers, to include provisions for the accountability and speedy return of prisoners of war, while codifying what was essentially U.S. policy during the war as to the treatment of enemy irregular soldiers.⁵⁵ The Vietnam War had signaled the advent of a new kind of war, one involving the extensive use of guerilla tactics and therefore representing a new, more potent threat to

civilians who might be caught up in the fighting. Ironically, then, it is the United States which primarily drafted and pushed for the inclusion of what has since been characterized as the Protocol's most objectionable provision, Article 44.

As in the case of Article 1(4), the argument against this provision is starkly alarmist: Article 44, and its paragraph 3 in particular, "lowers the bar" for qualification of combatants, and therefore makes it much more difficult to apply the principle of distinction.⁵⁶ Because this provision blurs the boundary between combatant and civilian, goes the argument, the Protocol puts innocent people at greater risk of harm or even death while "giving rights to terrorists."⁵⁷ Article 44 is correctly viewed as a relaxing of the four mandatory requirements of Article 4(A)(2) of the 3rd Geneva Convention Relative to the Treatment of Prisoners of War, for "irregulars" to qualify for combatant and, in the case of capture, prisoner of war status, which stated that:

(2) Members of other militaries and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.⁵⁸

The full text of Article 44(3) of Protocol I modifies GCIII's more stringent requirements, stating that:

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves

from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an unarmed combatant cannot so distinguish himself, he shall retain his status as a combatant provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirement of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).⁵⁹

At first glance, it does in fact appear that the relaxing of the standard for combatant status, and the concomitant right to participate directly in hostilities, constitutes a drastic change. Where is the requirement that such irregulars be commanded by a responsible person, and that they belong to a Party to the conflict? What about the necessity that such individuals display a fixed distinctive sign (e.g., wear a standard uniform), or that they conduct operations in accordance with the laws and customs of war? Such a hurried reading fairly leads to the conclusion that “terrorists,” beholden only to their own twisted ideology, could take advantage of these provisions to conceal themselves amongst the civilian population, leap out and conduct an attack—perhaps against those same civilians-- and still claim prisoner of war status and immunity from prosecution for war crimes. That this Article constitutes an invitation to disregard the fundamental principle of distinction, while granting combatant status to individual non-state actors (e.g., terrorist groups) is an appealing and oft-repeated argument against Protocol I.

Yet, upon further examination, the “pro-terrorist” argument, often wrapped around both Articles 1(4) and 44, and from there extended to the entire treaty, is a specious one. It fails to recognize that Article 44 does not *confer* combatant status upon any persons who would otherwise not have it: Article 44(1) clearly refers back to Article 43 for that important definition.⁶⁰ Article 43 *does* confer combatant status on “the armed forces of a Party to a conflict” consisting of “all organized forces, groups and units which are under a *command responsible to that Party* for the conduct of its subordinates.”⁶¹ Furthermore, “[s]uch armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.”⁶²

Arguably, three out of the Geneva Convention’s four requirements for combatant status remain fundamentally extant. The impetus to significantly update the remaining requirement—that of bearing a distinctive insignia— had its roots in an understandable desire to provide greater protection to those partisans who courageously fought against the Nazi occupation during World War II. The provision also takes into account the frank recognition that even the regular armed forces of many of the world’s poorest countries-- much less the disparate militia groups with which our own military fought side by side in the remotest parts of Afghanistan—often lack anything but the most rudimentary elements of a uniform. Even so, “failure by a combatant to distinguish himself from the civilian population throughout his military operations is a punishable offense” under Protocol I.⁶³ By imposing more realistic, if less rigid, requirements which are actually capable of being fulfilled, the provision better serves the underlying principle of distinction.

The Anti-Terrorist Treaty

Despite its emphasis on combatants' responsibility to distinguish themselves "while they are engaged in an attack or in a military operation preparatory to an attack," Article 44 still recognizes that "that there are situations in armed conflicts where, owing to the *nature of the hostilities*, an *unarmed* combatant cannot so distinguish himself."⁶⁴ What are these circumstances? Both through common understanding at the diplomatic conference and through specific reservations by several countries, these circumstances are, again, limited to cases of partisan resistance to occupation by a foreign power.⁶⁵ The French Resistance, for example, did indeed melt into the population when not conducting military operations against the Nazis in order to survive; so, too, did Filipino guerillas fighting the Imperial Japanese forces, and Afghan *Mujahedin* repelling Soviet invaders. But could *al-Qa'eda* operatives similarly avail themselves of combatant status (and POW status if captured) under Articles 43 and 44? Not under any reasonable interpretation of Protocol I's provisions, which prerequisites they would fail to fulfill in numerous instances, any one of which is disqualifying:

- Al Qa'eda is a transnational, non-state actor which does not belong to the Armed Forces of any Party to an armed conflict;⁶⁶
- They are not operating in occupied territory.⁶⁷
- Their operatives and "flat" networks of cells are not under the command of any person responsible to a Party;
- They are not subject to any internal disciplinary system enforcing compliance with the Law of War: rather, the opposite is true.⁶⁸
- They do not carry arms openly and fail to distinguish themselves from the civilian population while preparing to launch an attack or engaging in an attack, which therefore constitute perfidious acts prohibited under Article 37(1)(c).⁶⁹

Even if these individuals were somehow to qualify for prisoner of war status despite the many hurdles they must overcome, it is simply dead wrong to state that any such captured operative would then be protected from prosecution for war crimes. In fact-- for the first time in an international treaty-- Article 85 of Protocol I specifically lists as punishable "grave breaches" a number of typical terrorist acts, for instance, "making the civilian population or individual civilians the object of attack," and "launching an indiscriminate attack" or "an attack against works or installations containing dangerous forces," such as nuclear power plants, in the knowledge that such attacks "will cause excessive loss of life, injury to civilians or damage to civilian objects."⁷⁰ As several commentators have pointed out, the list of offenses in Article 85 is not new: most were already prohibited under The Hague Regulations and the Nuremberg Charter. "What *is* new" is that, by declaring the conduct to be a "grave breach," the Protocol obliges "States to enact domestic legislation criminalizing the conduct... and providing for the possibility either to extradite or to prosecute persons who are suspected or convicted of grave breaches."⁷¹ "The comprehensive extent to which Protocol I prohibits virtually all violent acts committed by terrorists, making the more serious breaches universal crimes subject to the jurisdiction of all Parties, can hardly be said to be a 'pro-terrorist treaty'"⁷².

Therefore, polemical views to the contrary, neither Article 1(4) nor Article 44 were ever really immovable obstacles to American acceptance of Protocol I, albeit subject to clarifications or reservation, and are even less so today. But the U.S. has not joined the Protocol, and indeed seems likely to remain outside it along with a small number of nations—"Iran and Iraq, Pakistan and India, Myanmar and Nepal, most of the south-east Asian states... Israel, Somalia, Sudan, Sri Lanka, Eritrea, and Morocco--

which constitute “a who’s who of many of the states that have been engaged in conflicts over the past 30 years.”⁷³ What are the ramifications, both internally for our forces and internationally, of our effective decision not to ratify? And, despite our decision not to join the treaty, could portions of it nonetheless bind the United States even without its ratification? To the extent that they codify customary international law, the answer is yes.

Customary International Law: The Ties that Bind

The primary sources of international law are international treaties and conventions, customary international law, general principles of law recognized by civilized nations, judicial decisions, and the writings of respected publicists from around the world.⁷⁴ By effect of Article VI, the Constitution of the United States, “all Treaties made... under the Authority of the United States” join the Constitution and “the Laws made in pursuance thereof” in constituting “the supreme Law of the Land,” binding on every judge in the country.⁷⁵ For over 200 years, U.S. courts have consistently recognized the authority of customary international law as being on par with treaties and equally binding. In the *Paquette Habana- The Lola* case, the Supreme Court held that “international law is part of our law,” and that, where there is no applicable “express treaty or other public act,” “resort must be had to the customs and usages of civilized nations.”⁷⁶ International courts have also repeatedly stressed the binding nature of customary international law on states⁷⁷ (and the legitimacy of individual criminal prosecutions for its violation).⁷⁸ Understood as having two complementary roots, customary international law develops over time through: (1) state practice, assessed in terms of generality, consistency, and duration, and (2) *opinio juris*, the understanding or belief

that a state practice is “accepted as law.”⁷⁹ As a result, even though a nation may not be party to a particular treaty, it may nevertheless be bound by those provisions of that treaty which either codify existing customary international law at the time of ratification, or mature over time into universally binding rules. This dynamic poses significant challenges for the U.S. in terms of its non-ratification of Protocol I, as it is those states that are *not* party to it “whose interests will be especially affected by the crystallization of custom.”⁸⁰

The task of identifying rules of customary international law is fraught with difficulties, given that customary international law is, by its very nature, fluid and imprecise.⁸¹ The International Committee of the Red Cross (ICRC) recently published a study entitled *Customary International Humanitarian Law*, “the idea being to capture the clearest possible ‘photograph’ of customary international law as it stands today” in an effort to “clarify the meaning and significance” of the rules of the law of armed conflict and ensure “greater protection for war victims.”⁸² The Report is an impressive and ambitious project, spanning three large and weighty volumes. A quick survey of Volume I, “Rules,” reveals numerous references to Protocol I provisions as having codified customary international law. For example, it finds the fundamental principle of distinction reflected in Articles 48 (Basic Rule), 51(2)(Protection of the Civilian Populace), and 52(2)(Civilian Objects).⁸³ Some commentators on this sweeping study correctly point out that its evidence for the ripening of practice into customary international law is often sketchy.⁸⁴ Some critics (who are also implacable foes of Protocol I) have seized on the report as an opportunity to attack the impartiality of the ICRC, and the authoritativeness of any of its works, and particularly this study.⁸⁵ These

critics, however, miss the point that the ICRC's efforts were necessarily complicated by its having to labor to uncover the accepted practice of the most influential player on the world stage today, the United States. Our lack of acceptance of the Protocol, and further, our inability to articulate a clear position on the authority of its provisions, frequently required the ICRC to "triangulate" our position from whatever available sources, pronouncements, manuals or evidence of practices it could find.

Lighthouses in the Fog: Some Cases in Point

"In the long march of mankind from the cave to the computer, a central role has always been played by the idea of law—the idea that order is necessary and chaos inimical to a just and stable existence."⁸⁶

Disregard for the principles underlying customary international law and their codification presents practical dangers to our own troops as well as to our national strategic goals. "Treating, or appearing to treat, the law in a cavalier manner risks creating new problems."⁸⁷ The widely-publicized abuse of detainees and prisoners at Abu Ghraib prison by American soldiers, for instance, and the allegations of mistreatment at Guantanamo Bay and elsewhere, point back to a series of misguided and legally-deficient internal government memorandums.⁸⁸ These legal opinions, which tended to downgrade or ignore the U.S.'s duties and obligations under customary international law, might well have set the stage for those criminal abuses to occur. Even "unprivileged belligerents" who "are not entitled to POW status" are nevertheless "entitled, under customary international law, to humane treatment of the same nature as that prescribed by Article 3 common to the four Geneva Conventions of 1949 and, in more detail, by Article 75 of Additional Protocol I."⁸⁹ Under customary international

law, this “minimum yardstick of protection” applies in all armed conflicts, whether characterized as international or non-international.⁹⁰ Unfortunately, the President was instead incorrectly advised by the Department of Justice “that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character.’”⁹¹ A clear understanding of the significance and binding power of customary international law, and specifically the applicability of Common Article 3 and especially Article 75 of Protocol I, might have helped prevent the tragedy of Abu Ghraib, the subsequent, devastating injury to the U.S.’s reputation and influence within the Muslim world, and the exposure to criminal liability of our own troops.

Protocol I continues to influence the development of contemporary international law in cutting-edge areas of the law, such as criminal prosecutions for war crimes: its provisions codifying customary international law are playing a crucial role in these important cases. “Crimes prosecuted by U.S. Military Commissions pursuant to the 13 November 2001 Military Order,” for example, “will depend almost entirely on the customary law of armed conflict.”⁹² Military Commission Instruction #2, which lists the crimes and elements for which “enemy combatants” at Guantanamo Bay will be tried, reflects and sometimes directly employs the language of Protocol I relating to the protection of civilians and civilian populations. For example, listed crimes include attacking civilians and civilian objects (as proscribed in API, Article 85(3)), and using protected persons as shields (Article 51), while the definition for “Military Objective” is taken directly from Article 52(2) of the protocol.⁹³ Given that the United States has not

ratified Protocol I, one must conclude that the provisions used to establish the criminality of these acts must—in accordance with the principle of *nullum crimen sine lege*, “no crime without law”—codify recognized rules of customary international law. Similarly, the new Iraqi Special Tribunal set to try Saddam Hussein is modeled on the International Criminal Court, its crimes and elements taken from the Rome Treaty. This statute, drafted primarily by the United States (and now opposed by it), also reflects much of the language and approach of Protocol I.⁹⁴ The listed crimes and its equivalent Article out of Protocol I include: making improper use of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions (API Articles 38 and 39); declaring that no quarter will be given (Article 40); utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations (Article 50(7)); and intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival (Article 54).⁹⁵ Again, where there is no law, there is no crime: Iraq, like the U.S., is not a signatory to the Protocol. Therefore, the prosecution of Saddam Hussein and others also depends on pre-existing, customary international law. The U.S. can hardly draw on the customary international law undergirdings of the Protocol to prosecute these individuals, while at the same time failing to recognize that this source of law binds its own actions as well.

An Urgent Need for Clarity

As the preeminent military power, the United States has an interest in clear and universal rules of warfare.⁹⁶

In the nearly three decades since the Protocols were drafted, the international legal landscape has changed remarkably. The “Cold War” and the struggles of decolonization have subsided, transnational terrorism has made a spectacular and horrifying appearance, and the rest of the world-- as the U.S. has tacitly acknowledged-- continues to accept more and more of Protocol I as reflective of customary international law. A battle of ideas is now intensifying within the U.S. itself as to its role in the world, its relationship to the community of nations, and its responsibilities within the structure of international law which it has been so instrumental in building. The fate of Protocol I—unfairly maligned as a pro-terrorist treaty-- is simply one front of that battle. This paper argues for a principled stand, one that recognizes that a robust system of international law and clear, well-respected laws of war is our best hope for a peaceful and prosperous future. Rather than providing greater freedom of action, the quest to preserve all options in the pursuit of the “Global War on Terror” by adopting a position of legal ambiguity has led to confusion and error, and has hindered our efforts to win others to our side in the campaign against al-Qa’eda and the threat of transnational terrorism.

Lead, Follow, or Get Out of the Way

Ideally, then, the United States should ratify Protocol I, subject to a small number of well-defined understandings and reservations as to those few provisions-- such as Articles 1(4) and 44(3)-- to which we have continually objected.⁹⁷ There could be no clearer statement of our position in support of Protocol I’s positive development of the law of war, and its “decisive contribution to the outlawing of terrorist acts and thus to the fight against terrorism.”⁹⁸ This presupposes a reasonable, objective approach to the Protocol, not “the worst possible interpretation of treaty provisions in order to defeat their

ratification.”⁹⁹ A treaty should be interpreted “in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context, and in the light of its object and purpose.”¹⁰⁰ Annex I to this paper is an attempt to apply such an approach to the Protocol, by laying out which provisions codify customary international law or constitute new developments in the law, and making recommendations as to their acceptability.

Failing ratification, we must nevertheless recall President Ronald Reagan’s promise to confer with our allies “to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law.”¹⁰¹ The U.S. should make good on that promise, reopen the dialog with our partners and competitors around the world, and rejoin the global discussion as to the current state and the future direction of the Law of War. We should actively champion the dissemination and implementation of the best of Protocol I, the most important document in the law of war in fifty years. The drafting for the first time of a Joint Department of Defense “Law of War Manual,” an effort now underway, will certainly be an extremely important step toward that end for our own military.¹⁰²

Ultimately, however, we must take up the mantle of leadership in the world community. “Like any ideal, law only exists because we choose to think it.”¹⁰³ As the sole superpower in an increasingly multi-polar world, what the United States thinks, and the principles it champions and puts into practice, are eminently important. “The U.S.’s ability to influence others as a respected member of the international community” cannot be overstated.¹⁰⁴ Neither should this power-- and the responsibility that goes with it-- be squandered. Otherwise, we risk either thwarting the healthy growth and development of

the law of armed conflict, or else standing stubbornly by while it proceeds without us in directions that may be contrary to America's best interests.

ANNEX I

Major Additional Protocol I Provisions with Recommendations

| <u>Article</u> | <i>Recommendations:</i> |
|---|---|
| | <ul style="list-style-type: none"> • <i>Accept/Reject</i> • <i>Declarations</i> |
| <i>1(4) -- "Wars of National Liberation"</i> | Accept w/o comment (no impact) <i>or</i> adopt UK-style reservation. |
| <i>5 -- Protecting Powers</i> | Accept. |
| <i>33 -- Missing Persons</i> | Accept. |
| <i>35(3)-- Widespread, long-term damage to the environment</i> | Accept; note API does not apply to Nuclear Weapons. |
| <i>36 -- New Weapons</i> | Accept. |
| <i>37 -- Perfidy</i> | Accept. |
| <i>38 -- Recognized Emblems</i> | Accept. |
| <i>39 -- Emblems of Nationality</i> | Accept. |
| <i>40 -- Quarter</i> | Accept. |
| <i>41 -- Safeguard of an Enemy Hors de Combat</i> | Accept. |
| <i>42 -- Occupants of Aircraft</i> | Accept. |
| <i>43 -- Armed Forces</i> | Accept. |
| <i>44(3) -- Combatants & POWs</i> | Accept w/ clarification. |
| <i>45 -- Protection of Persons Who Have Taken Part in Hostilities/ Presumption of POW</i> | New Development. Consistent w/ US Policy. |
| <i>46 -- Spies</i> | Accept. |
| <i>47 -- Mercenaries</i> | No Impact. |

Articles

Recommendations:

- **Accept/Reject**
- **Declarations**

| | |
|--|---|
| <i>48 – Principle of Distinction</i> | Accept. |
| <i>49 – Attacks</i> | Accept. |
| <i>50 – Definition of Civilians</i> | Accept. |
| <i>51 – Protection of the Civilian Population</i> | Accept, except 51(6) – Reprisals Reservation. |
| <i>52 – Civilian Objects, Definition of Military Targets</i> | Accept. |
| <i>53 – Protection of cultural objects & places of worship.</i> | Accept with understanding. |
| <i>54 – Protection of objects indispensable to the survival of the civilian population</i> | Accept. |
| <i>55 – Protection of the Natural Environment</i> | Accept. |
| <i>56 – Protection of works & installations containing dangerous forces.</i> | Accept with understanding. |
| <i>57-58 – Precautions in attack</i> | Accept. |
| <i>59 – Non-defended Localities</i> | Accept. |
| <i>60 – Demilitarized Zone</i> | Accept. |
| <i>61-67 – Civil Defense</i> | Accept. |
| <i>68-71 – Relief in favour of the civilian population</i> | Accept. |
| <i>72-79 Treatment of persons in power of party to a conflict</i> | Accept. |
| <i>81 – Activities of Red Cross</i> | Accept. |

Articles

Recommendations

- **Accept/Reject**
- **Declarations**

83 – *Dissemination*

Accept.

85 – *Repression of
Breaches/Listing of Grave
Breaches*

Accept.

86/87 – *Command
Responsibility*

Accept.

88/89 – *Mutual Assistance &
Cooperation in Criminal
Matters*

Accept.

90 – *International Fact-
Finding Commission*

Accept.

91 – *State Responsibility*

Accept.

ANNEX II

Proposed Reservations & Clarifications

(1) It is the understanding of the USA that the rules established by this protocol were not intended to have any effect on and do not prohibit the use of nuclear weapons.^a

(2) It is the understanding of the USA that the term “armed conflict” as used in Article 1, paragraph 4, and Article 96, paragraph 3, denotes a situation of a kind which is not constituted by the commission of ordinary crimes, including acts of terrorism, whether concerted or in isolation. Further, the USA will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the USA has *expressly recognized* that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4 applies.^b

(2) It is the understanding of the USA that the phrase “military deployment preceding the launching of an attack” in Article 44, paragraph 3, means any movement towards a place from which an attack is to be launched.^c It is the further understanding of the USA that the situation described in the second sentence of paragraph 3 can exist only in occupied territory or in armed conflicts covered by Article 1, paragraph 4.^d

(3) The USA reserves the right to react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular Article 51, paragraph 6.^e

(4) It is the understanding of the USA that if cultural objects and places of worship protected under Article 53 are unlawfully used for military purposes, they will lose their protection from attack for as long as they are so used.

(5) It is the understanding of the USA that Article 56 encompasses a special need for particularly careful weighing of the principles of military necessity, proportionality and unnecessary suffering to the listed installations, rather than an absolute prohibition against all targeting of such installations if they are otherwise valid military targets.

^a Stated by the United States at signature. Roberts & Guelff, at 512.

^b Based on reservation by the United Kingdom. Ibid, at 510.

^c Stated by the United States at signature. Ibid, at 512.

^d Based on declaration by New Zealand. Ibid, at 508.

^e Based on declaration by Italy, Ibid, at 507.

¹ Jacques Meurant, "Inter Armas Caritas: Evolution and Nature of International Humanitarian Law," *Journal of Peace Research*, Vol. 24, No. 3, Special Issue on Humanitarian Law of Armed Conflict (Sep., 1987), 237-249, at 246.

² Adam Roberts & Richard Guelff, *Documents on the Laws of War*, 3rd Edition, Oxford University Press, New York, 2003, at 420.

³ *Ibid*, at 481.

⁴ The Law of Geneva protects the victims of war, i.e., the wounded and sick, the shipwrecked at sea, prisoners of war, and civilians. The Law of The Hague regulates the "methods and means" of warfare.

⁵ Roberts & Guelff, at 497.

⁶ See the website of the International Committee of the Red Cross at <http://www.icrc.org/ihl.nsf/NORM?OpenView&Start=1&Count=150&Expand=52.1#52.1>.

⁷ According to W. Hays Parks, of the Foreign Affairs Division, Office of the General Counsel, Department of Defense, the U.S., leads the world in implementing Article 36, which requires the extensive testing of new weapons for compliance with the Law of War, and Article 82, which requires parties to ensure that trained legal advisors be available to advise military commanders and teach law of war responsibilities to its armed forces.

⁸ *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, 24 April 1863. The Lieber Code is "one of the first attempts to codify the laws of land warfare," and became a model code for numerous other countries. Roberts & Guelff, at 12.

⁹ William Safire, "Rights for Terrorists?" *New York Times*, November 15, 1984, p. A-31.

¹⁰ Douglas J. Feith, "Law in the Service of Terror—The Strange Case of the Additional Protocol," *National Interest*, No. 1, Fall 1985, at 36.

¹¹ *Ibid*, at 46.

¹² *Ibid*, at 47.

¹³ Ronald W. Reagan, Geneva Conventions Protocol, "Message to the Senate Transmitting the Protocol," January 29, 1987, as included in Hans-Peter Gasser, "Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims," *The American Journal of International Law*, Vol. 81 1987, p. 910.

¹⁴ *Ibid*. Though President Reagan did forward Protocol II for ratification, to this date the Senate has not ratified it.

¹⁵ George P. Schultz, Secretary of State, "Letter of Submittal," S. Treaty Doc. No. 2, 100th Cong., 1st Sess. (1987).

¹⁶ Additional Protocol I (hereinafter, API), Article 1(4).

¹⁷ API, Article 44(3).

¹⁸ Gasser, at 911.

¹⁹ Gasser, at 912.

²⁰ Gasser, 912.

²¹ 156 countries have also ratified Additional Protocol II. See the website of the International Committee of the Red Cross at <http://www.icrc.org/ihl.nsf/NORM?OpenView&Start=1&Count=150&Expand=52.1#52.1>

²² “*The Matheson Article*.” In 1987, then-Deputy Legal Advisor to the U.S. State Department, a high-level member of the department, Michael J. Matheson, made remarks at an American University workshop which were later published as an article, “The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions.” His statements were in turn based on a DoD Working Group memorandum. Michael J. Matheson, “The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention,” 2 Am. U.J. Int’l & Pol’y 419 (1987).

²³ The Judge Advocate General's School of the Army, International and Operational Law Department, annually publishes the “Operational Law Handbook.” OPERATIONAL LAW HANDBOOK (Year), International & Operational Law Department, The Judge Advocate General’s School, US Army, Charlottesville, VA, JA 422.

²⁴ 2004 Operational Law Handbook, *italics mine*.

²⁵ “*Errata Sheet*,” 2005 Operational Law Handbook, TJAGSA. On the 27th of September, 2004, The Judge Advocate General’s School of the Army issued an “Errata Sheet” for the 2005 Handbook stating that the section entitled Additional Protocol I, “para. VI.C.1 should be disregarded.”

²⁶ Hays W. Parks, “Special Forces’ Wear of Non-Standard Uniforms,” *Chicago Journal of International Law*, Volume 4, Number 2, Fall 2003.

²⁷ *Ibid*, at footnote 55, confirming only that part of Mr. Matheson’s statements as to the “provisions of Additional Protocol I regarded by the United States as customary law based upon the DoD Law of War Working Group memorandum.”

²⁸ *Air Force Operations and the Law, First Edition 2002*, p. 143.

²⁹ *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP5-2.1, Newport, RI, 1997.

³⁰ FM 27-10 and AFP 110-31, Ch. 14., as cited in 1LT Melissa J. Epstein, USMC, and CW3 Richard Butler, USA, “The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions,” 179 *Mil. L. Rev.* 68., at 85.

³¹ George P. Schultz, Secretary of State, “*Letter of Submittal*,” S. Treaty Doc. No. 2, 100th Cong., 1st Sess. (1987).

³² Conversation with Professor Hans Kalshoven, April 15, 2005.

³³ Douglas Feith, "Law in the Service of Terror—The Strange Case of the Additional Protocol," *The National Interest*, No. 1, Fall 1985, at 36.

³⁴ George H. Aldrich, citing Judge Abraham D. Sofaer, "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions," *The American Journal of International Law*, Vol. 85, No. 1 (Jan., 1991), 1-20, at 4.

³⁵ Aldrich, at 3.

³⁶ Aldrich, at 5.

³⁷ Reagan, as quoted by Gasser at 911.

³⁸ "Common Article 2" is common to all four Geneva Conventions, and states that the "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The Four 1949 Geneva Conventions.

³⁹ Article 1(4).

⁴⁰ Leslie H. Gelb, "War Law Pact Faces Objection of Joint Chiefs," *The New York Times*, July 22 1985, p. A-1, quoting Douglas J. Feith, then Deputy Assistant Secretary of Defense for Negotiations Policy and "the key official in the Pentagon" on the Protocol issue.

⁴¹ Several "national liberation movements" attended the conference as observers, but without a vote. Gasser 915.

⁴² According to the CIA Factbook, "Civil war has been the norm in Angola since independence from Portugal in 1975," and has caused an estimated 1.5 million deaths since then.
<http://www.faq.s.org/docs/factbook/geos/ao.html>

⁴³ Gasser, at 917.

⁴⁴ As Article 1(4) only applies if the state concerned is both a party to the Protocol, and agrees that the situation is one of "alien occupation," which no nation-- much less Israel-- is likely to do, the provision is inapplicable.

⁴⁵ API, Article 96(3).

⁴⁶ *Ibid.*

⁴⁷ Gasser, at 922.

⁴⁸ Aldrich, at 6, writing in 1991. This author knows of no such cases in the years since Mr. Aldrich's article.

⁴⁹ Aldrich, at 2.

⁵⁰ Preamble, *International Convention Against the Taking of Hostages*. Done at New York December 17, 1979; entered into force June 3, 1983; for the United States January 6, 1985.

⁵¹ Article 12, *International Convention Against the Taking of Hostages*.

⁵² API, Preamble.

⁵³ Aldrich, at 7.

⁵⁴ According to Gasser at 921, the final text of Article 44 was negotiated by the American and Vietnamese delegations.

⁵⁵ Gasser at 921.

⁵⁶ See David B. Rivkin, Jr., & Lee A. Casey, "Leashing the Dogs of War," *The National Interest*, Fall 2003, p. 9. According to Rivkin and Casey, Protocol I benefits "practitioners of 'asymmetric' warfare, not to mention downright criminals."

⁵⁷ William Safire, "Rights for Terrorists?" *New York Times*, November 15, 1984, p. A-31.

⁵⁸ Article 4(A)(2), *Fourth Geneva Convention of 1949*.

⁵⁹ Article 44(3), AP I.

⁶⁰ Article 44(1) states, "Any *combatant*, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war." *Italics mine*.

⁶¹ Article 43(1).

⁶² Article 43(1).

⁶³ George H. Aldrich, "Additional Protocol I," *Humanitarian Law of Armed Conflict: Challenges Ahead; Essays in Honor of Frits Kalshoven*, Ed. Astrid J.M. Delissen, Gerard J. Tanja, (Dordrecht: Martinus Nijhoff, 1991), at 141.

⁶⁴ Article 44(3).

⁶⁵ See George S. Prugh, MG (Ret.), "American Issues & Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions," *Military Law & Law of War Review*, Vol. XXXI (1992). Wars of National Liberation, which to all intents and purposes have been eliminated as discussed above, would also theoretically be included.

⁶⁶ George H. Aldrich, "The Taliban, Al Qaeda, and the Determination of Illegal Combatants," *The American Journal of International Law*, Vol. 96, No. 4 (Oct., 2002), 891, at 893. Even during the armed conflict against coalition forces in Afghanistan, according to George H. Aldrich, there is "no evidence [that he knows of] suggesting that Qaeda personnel were incorporated in Taliban military units as part of the Taliban armed forces."

⁶⁷ Unless one were to accede to their ideological position that they are “fighting... to reacquire land once ruled by Muslims,” and that all lands once part of the Islamic Empire at its height in the 16th century are therefore today occupied territories. Anonymous, *Imperial Hubris: Why the West is Losing the War on Terror* (New York: Brassey’s, Inc, 2004), at 141.

⁶⁸ Osama bin Laden himself specifically rejects the fundamental principle of distinction, ordering his followers, via a 1998 “World Islamic Front Statement,” that “[t]he ruling to kill the Americans and their allies -- *civilians and military* -- is an individual duty for every Muslim who can do it, in any country in which it is possible to do it.”

⁶⁹ Article 37(1)(c), Prohibition of Perfidy, states in relevant part:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy... (c) the feigning of civilian, non-combatant status.

⁷⁰ Prugh, at 247, and Article 85(3)(a)(b) & (c). Also, see 1LT Melissa J. Epstein, USMC, and CW3 Richard Butler, USA, “The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions,” 179 *Mil. L. Rev.* 68, Spring 2004.

⁷¹ C. van den Wyngaert, “War Crimes under Protocol I,” *Humanitarian Law of Armed Conflict: Challenges Ahead; Essays in Honor of Frits Kalshoven*, Ed. Astrid J.M. Delissen, Gerard J. Tanja, (Dordrecht: Martinus Nijhoff, 1991), at 199.

⁷² Waldemar A. Solf, “A Response to Douglas J. Feith’s Law in the Service of Terror-- The Strange Case of the Additional Protocol,” 20 *Akron L. Rev.* 261, at 261 (1986).

⁷³ Daniel Bethlehem, QC, Director, Lauterpacht Research Centre for International Law, University of Cambridge, in remarks on “The ICRC Customary Law Study: An Assessment,” delivered 18 April 2005, Conference at Chatham House, *The Law of Armed Conflict: Problems and Prospects*, at 4.

⁷⁴ Malcolm L. Shaw, *International Law* (New York: Cambridge University Press, 1997), at 55. According to Shaw, Article 38(1) of the Statute of the International Court of Justice, from which these sources are paraphrased, “is widely recognized as the most authoritative statement as to the sources of international law.”

⁷⁵ The Constitution of the United States, Article VI.

⁷⁶ *The Paquete Habana* (The “Lola”), 175 U.S. 677, at 700 and 708.

⁷⁷ *Nicaragua v. United States of America*, Military and Paramilitary Activities In and Against Nicaragua, 1986 ICJ REP. 15 (Judgment of 27 June 1986).

⁷⁸ See, for example, *In Re Dusko Tadic: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (The Prosecutor v. Dusko Tadic), 1995 I.C.T.Y. No. IT-94-1-AR72 (2 October 1995), 35 I.L.M., 1996, p. 32.

⁷⁹ Mark E. Villiger, *Customary International Law and Treaties* (Dordrecht: Martinus Nijhoff Publishers, 1985), at 25, and Chapter 1, “A Modern Theory of Customary International Law,” generally.

⁸⁰ Bethlehem, at 4.

⁸¹ Conversation with Professor Hans Kalshoven, April 15, 2005.

⁸² Dr. Jakob Kellenberger, ICRC Report, *Customary International Humanitarian Law, Volume 1, Rules*, by Jean-Marie Henckaerts & Louise Doswald-Beck (Cambridge: Cambridge University Press, 2005), Foreword, at p. xi.

⁸³ *Ibid*, Volume 1, Rule 1, at p. 4.

⁸⁴ See W. Hays Parks, "The ICRC Customary Law Study: A Preliminary Assessment," Presentation offered at 99th Annual Meeting of the American Society of International Law, Washington, D.C., April 1, 2005.

⁸⁵ Lee A. Casey & David B. Rivkin, Jr., "Double-Red-Crossed," *The National Interest*, March 1, 200, at 67-68.

⁸⁶ Shaw, p.1.

⁸⁷ Adam Roberts, "Counter-Terrorism, Armed Force and the Laws of War," *Survival*, Vol. 44, No. 1, Spring 2002, pp. 7-32, at 27.

⁸⁸ See *The Torture Memos: The Road to Abu Ghraib*, Ed. Karen J. Greenburg and Joshua L. Dratel, (Cambridge University Press: Cambridge, 2005).

⁸⁹ George H. Aldrich, "The Taliban, Al Qaeda, and the Determination of Illegal Combatants," *The American Journal of International Law*, Vol. 96, No. 4 (Oct., 2002), 891, at 893. "Unprivileged belligerents" may still "be lawfully prosecuted and punished under national laws for taking part in the hostilities and for any other crimes, such as murder and assault, that they may have committed." *Ibid*.

⁹⁰ *Nicaragua v. U.S.*, 1986 I.C.J. 14, at 218 (27 June 1986).

⁹¹ MEMORANDUM from President George W. Bush to the Vice President, *et. al* (Feb. 7, 2002), "Subject: Humane Treatment of *al Qaeda* and Taliban Detainees," found in *The Torture Papers*, at 129.

⁹² 1LT Melissa J. Epstein, USMC, and CW3 Richard Butler, USA, "The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions," 179 *Mil. L. Rev.* 68, Spring 2004, at 91, referring to Military Commission Instruction #1.

⁹³ The U.S. is already a state party to this definition because it is contained in Article 2 of Amended Protocol II to the Conventional Weapons Convention, which the US has ratified. Roberts & Guelff, at 537.

⁹⁴ See *THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL*, accessed at http://www.cpa-iraq.org/human_rights/Statute.htm

⁹⁵ *Ibid*, Part 4, Article 13(b).

⁹⁶ Theodor Meron, "The Time has come for the United States to Ratify Geneva Protocol I," *The American Journal of International Law*, October, 1994, 88 A.J.I.L. 678, 686 (1994).

⁹⁷ See Annex II.

⁹⁸ Gasser, at 913.

⁹⁹ Waldemar A. Solf, "A Response to Douglas J. Feith's Law in the Service of Terror-- The Strange Case of the Additional Protocol," 20 Akron L. Rev. 261, at 261 (1986).

¹⁰⁰ Gasser at 921, citing *The Vienna Convention on the Law of Treaties*, Art. 31(1), UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), reprinted in 63 *AJIL* 875 (1969).

¹⁰¹ Ronald W. Reagan, Geneva Conventions Protocol, "Message to the Senate Transmitting the Protocol," January 29, 1987, as included in Hans-Peter Gasser, "Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims," *The American Journal of International Law*, Vol. 81 1987, at 912.

¹⁰² Mr. W. Hays Parks, of the International Affairs Division, Office of General Counsel, Department of Defense, is currently heading this much-needed and unprecedented effort.

¹⁰³ Jorg Kammerhofer, "Uncertainty in the Formal Sources of International Law," *European Journal of International Law*, Volume 15, No. 3 (June 2004), 523-553, at 553.

¹⁰⁴ Conversation with Professor Fritz Kalshoven, April 15, 2005.